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No. 90-1412

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF ALABAMA HIGHWAY DEPARTMENT,
Petitioner,

vs.

SHIRLEY ANN BOONE, as Administratrix of the Estate of Vernon Dale Boone, Jr.; SHIRLEY ANN BOONE, individually; SHIRLEY ANN BOONE on behalf of Kelley Lee Boone, the minor child and dependent of Vernon Dale Boone, Jr.; SOUTHERN RAILWAY COMPANY; THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY; NORFOLK SOUTHERN CORPORATION; and CITY OF LEEDS, ALABAMA,
Respondents.

Petition for a Writ of Certiorari
to the Supreme Court of the State of Alabama

REPLY BRIEF OF PETITIONER TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The Petitioner State of Alabama Highway Department submits this Reply Brief in response to Respondent Shirley Ann Boone's Brief in Opposition to Petition for Writ of Certiorari. Petitioner respectfully submits that the Petition for Writ of

Certiorari concerns an important question of federal law and should be granted. This Reply Brief addresses arguments raised in said Respondent's Brief.

REASONS FOR GRANTING THE WRIT

I. Respondent Shirley Ann Boone's Argument As to the Plain Meaning of 23 U.S.C. § 409 Supports Petitioner's Petition for Writ of Certiorari.

Respondent contends that Section 409 refers to "a trier of fact's consideration of the enumerated documents" and concludes that it does not permit that consideration but does permit discovery. The Alabama Supreme Court specifically required the trial judge to *consider* the documents covered by Section 409 and determine whether they are discoverable. The trial court was ordered to "determine which of the records, if any, are germane to any matters upon which the plaintiffs might pursue further discovery of evidence that may be admissible at trial." Petition, A-1. This order mandates the *consideration* of the documents by the trial court, which *consideration* is expressly forbidden by Section 409. As a result, the petition should be granted and the order of the Alabama Supreme Court reversed.

II. Respondent Shirley Ann Boone's Reliance on 49 U.S.C. app. § 1441(e) is Misplaced.

Respondent's reliance on 49 U.S.C. app. § 1441(e) to argue that 23 U.S.C. § 409 should be construed to permit discovery is misplaced. 49 U.S.C. app. § 1441(e) is a very different statute from Section 409 and is distinguishable in at least four ways. These distinctions make it clear that the result under the two statutes with respect to discovery is different.

First, the scope of documents protected by the two statutes is different. 49 U.S.C. app. § 1441(e) applies only to the "report or reports of the National Transportation Safety Board relating to

any accident or the investigation thereof" and not to the data collected by the NTSB. Section 409 encompasses

> reports, surveys, schedules, lists or data compiled for the purpose of identifying evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds.

Thus, while the NTSB statute only addresses specific reports prepared by the NTSB, Section 409 declares an encompassing privilege for all underlying data and resultant reports described therein. Because the scope of documents protected by the two statutes is so dissimilar, reliance on any analogy between them is misplaced.

Second, specific regulations under 49 U.S.C. app. § 1441(e) and certain related statutes explain what the privilege under that statute means. *See* 49 C.F.R. §§ 801.13, 801.50-801.59, 802.1-802.20, 831.6, 831.12, 831.13, 835.1-835.9 (1990). Indeed, the "report of the National Transportation Safety Board" has been defined by regulation in 49 C.F.R. § 835.2 (1990) as "the report containing the Board's determinations, including the probable cause of an accident . . .." That is, by regulation, the privilege under 49 U.S.C. app. § 1441(e) is limited to that report which contains the Board's determinations. With this definition, it is no surprise that courts have generally allowed the discovery of documents not containing such determinations.

On the other hand, no such regulations exist under Section 409, nor need any be promulgated. Section 409 is plain that the documents described therein may neither "be admitted into evidence . . . or considered for other purposes," which obviously includes discovery. The only thing which needs to be done is for

this Court to correct the erroneous interpretations given to Section 409 by the Alabama Supreme Court and other courts which have refused to recognize the clearly stated privilege from both admissibility and discovery.

Third, as pointed out by Respondent (Brief in Opposition at 7-8), 49 U.S.C. app. § 1441(e) covers reports on accidents which have already occurred. However, this difference weakens Respondent's argument that documents under 23 U.S.C. § 409 should be discoverable. In contrast, Section 409 is concerned with documents which deal, not with past accidents, but with a future course of conduct for identifying and improving, or not, potentially hazardous conditions. Obviously, a report which found that a particular location was hazardous enough to warrant improvement (but perhaps only after other projects were completed) could expose the maker of the report to potential liability or involvement in future accidents at that location. Congress was concerned that persons dutifully trying to make the highways of this country safer for the public be protected and so passed a law which made all reports privileged from both discovery and admissibility.

Fourth, the primary purpose of 49 U.S.C. app. § 1441(e) is different from the primary purpose of 23 U.S.C. § 409. The essential thrust of Section 1441(e) is to "prevent usurpation of the jury's role by evidentiary use of the Board's conclusions as to probable cause." *In re Air Crash Disaster at Stapleton Int'l*, 720 F. Supp. 1493, 1496 (D. Colo. 1989). In contrast, the purpose of Section 409 was to "foster the free flow of safety related information between the railroad industry and its regulatory bodies by precluding the possibility that such information would be discoverable and admissible in civil suits." *Bearden v. Southern Railway*, CV88-PT-0005-S, slip op. (N.D. Ala. July 11, 1988) (memorandum opinion) (Petition, p. A-36-37).

Respondent's reliance on 49 U.S.C. app. § 1441(e) is misplaced, because of the significant differences between that statute and Section 409. Section 409 should be given its full due.

CONCLUSION

The petition for writ of certiorari should be granted. The federal question raised by the petition is of great significance to the Petitioner and to all state highway departments.

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